U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 30Oct2001

CASE NO.: 2000-LHC-2866

OWCP NO.: 1-127718

In the Matter of:

SULTANA M. BRILLOWSKI
(Widow of Arnold Brillowski)
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insured

and

Director, Office of Workers' Compensation Programs
U.S. Department of Labor
Party-in-Interest

APPEARANCES:

Stephen C. Embry, Esq.
Melissa M. Olson, Esq.
For the Claimant

Peter D. Quay, Esq.
Mark W. Oberlatz, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

Before: **DAVID W. DI NARDI**
District Chief Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for compensation under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on December 21, 2000 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the

official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Arnold Brillowski (Decedent) and the Employer were in an employee-employer relationship at the relevant times.

3. Claimant alleges that her husband ("Decedent") suffered an injury and death on May 6, 1993 in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely fashion.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The applicable average weekly wage is $360.57, the National Average Weekly Wage as of the time of death on May 6, 1993. (**See** OWCP Notice No. 73, dated September 18, 1992.)

8. The Employer has paid no benefits herein.

The unresolved issues in this proceeding are:

1. The fact of injury.

2. Whether Decedent's acute myelocytic leukemia (AML) is causally related to his shipyard work.

3. If so, whether he died of such injury.

4. Entitlement by Claimant to an award of Death Benefits and interest on past due benefits due her.

5. Entitlement to an attorney's fee and reimbursement of litigation expenses.

6. Entitlement to an award of medical benefits.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
CX 15	Attorney Olson's letter filing the	01/19/01
CX 16	December 15, 2000 Deposition Testimony of Fred Evarts	01/19/01
RX 1A	Attorney Quay's letter (1) filing the following evidence on behalf of the Employer, and (2) requesting that the record be kept open to permit the filing of additional evidence	02/09/01
RX 1	Form LS-202, dated June 23, 1993	02/09/01
RX 2	Form LS-207, dated June 24, 1993	02/09/01
RX 3	Claimant's master personnel records	02/09/01
RX 4	Claimant's leave of absence form, with an effective date of May 29, 1988	02/09/01
RX 5	Claimant's Employee Severance Form, with an effective date of July 31, 1989	02/09/01
ALJ EX 8	This Court's **ORDER** granting the parties the requested extension of time	02/09/01
RX 6	Attorney Quay's letter filing the	02/14/01
RX 7	February 3, 2001 report of Kenneth A. Kern, M.D.	02/14/01
RX 8	Attorney Quay's notice relating to the taking of the deposition of Dr. Kern	02/14/01

RX 9	Notice relating to the taking of the deposition of Dr. Susan M. Daum	03/16/01
CX 17	FAX Cover Letter from Attorney Olson relating to her post-hearing evidence	05/21/01
RX 10	Attorney Quay’s status report	05/23/01
CX 18	Attorney Olson’s letter filing the	05/22/01
CX 19	March 23, 2001 Deposition Testimony of Dr. Daum, as well as CX 11, an exhibit identified and admitted into evidence at the hearing	05/22/01
CX 20	Exhibits discussed in Dr. Daum’s deposition testimony	05/22/01
CX 21	Attorney Olson’s letter moving that the record be closed	05/24/01
ALJ EX 9	This Court’s **ORDER**	05/31/01
CX 22	Attorney Olson’s letter refiling her	05/30/01
CX 23	Motion to Close the Record	05/30/01
RX 11	Attorney Quay’s letter filing the	06/08/01
RX 12	May 9, 2001 Deposition Testimony of Dr. Kenneth A. Kern	06/08/01
RX 13	Dr. Kern’s **Curriculum Vitae**	06/08/01
RX 14	Exhibit entitled “**Product Search by Ingredient For Dept. 252**"	06/08/01
RX 15	Attorney Quay’s letter filing the	07/16/01
RX 16	June 27, 2001 Deposition Testimony of Paul Bureau, as well as the	07/16/01

RX 17	June 27, 2001 Deposition Testimony of George Clohecy	07/16/01
RX 18	Attorney Quay's letter filing the following additional documents	07/11/01
RX 19	MSDS for "1102 Adhesive"	07/11/01
RX 20	MSDS for "PF-145 HP"	07/11/01
RX 21	MSDS for "1,1,1 - Trichloroethane"	07/11/01
CX 24	Attorney Olson's letter filing the	07/24/01
CX 25	August 8, 1983 Deposition Testimony of Henry Brayman, Jr., in **Anthony Santos v. General Dynamics Corporation and Insurance Company of North America**, Case No. 83-LHC-513	07/24/01
CX 26	April 24, 1984 **Decision & Order Awarding Benefits** in **Santos v. General Dynamics Corp, et al.**, Case No. 83-LHC-513, OWCP No. 1-61064	07/24/01
RX 22	Attorney Oberlatz's letter filing his status report	07/23/01
RX 23	Attorney Oberlatz's letter objecting to CX 25 as irrelevant and immaterial[1]	07/23/01
CX 27	Attorney Embry's letter filing his	08/06/01
CX 28	Fee Petition	08/06/01

[1]CX 25 and CX 26 are admitted into evidence as CX 25 is dated August 8, 1983, is more contemporaneous testimony and establishes that benzene was, in fact, used at the shipyard while Mr. Brayman worked there. I have also admitted it because that testimony is relevant and material herein and contradicts that of Mr. Clohecy (RX 17), as further discussed below.

RX 24	Attorney Quay's status report	08/13/01
RX 25	Attorney Quay's objections to the fee petition	08/13/01

The record was closed on August 13, 2001 as no further documents were filed.

Summary of the Evidence

Arnold P. Brillowski ("Decedent" herein), who was born on July 4, 1924 (CX 3) and who had an employment history of manual labor, began working on November 30, 1981 (RX 5) or May 5, 1080 (RX 3, RX 23) as a carpenter at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. (**Id.**)

The parties deposed Sultana M. Brillowski ("Claimant" herein) on January 2, 2000 in Milwaukee, Wisconsin, and the transcript of Claimant's testimony is in evidence as CX 14. Claimant testified that her deceased husband, prior to going to work for the Employer, had worked as a tractor trailer driver for a company in Milwaukee from 1963 to 1977, that she and Decedent were married on November 30, 1942 in Elkton, Maryland (CX 4) and that they moved to Connecticut in 1980 to be near their daughter and son-in-law, that Decedent had no family doctor in Connecticut because "he never was sick," that he stopped working on May 23, 1988 to undergo heart surgery in Milwaukee (RX 4) and was out of work on a leave of absence until July 31, 1989, at which time he took a "Normal Retirement." (RX 5) I note that the Employee Severance Form, dated July 31, 1989, reflects that Decedent, because of the nature of his shipyard employment, required a chest scan and a physical examination as part of the Employer's "Radiation Termination" procedures and that was scheduled to take place at the Employer's Yard Hospital on August 7, 1989. (RX 5)[2] (CX 14 at 3-7)

Decedent, who was being treated by Dr. Hastings for adult onset diabetes, did have a doctor in New London, Connecticut for his diabetes but Claimant could not recall his name. According to Claimant, her husband "was a workaholic" and "never missed work" until May of 1988, at which time his cardiac problems were

[2]The record does not contain that diagnostic test and/or the physical examination record, if performed at all.

diagnosed. He also underwent heart bypass surgery, apparently in November of 1992. Decedent's best friends at the shipyard were Fred Evarts and a Mr. Brown who had recently passed away. Decedent worked at the shipyard as a carpenter and, according to Claimant, he "worked on the submarines," "had to put on a lot of glues with the insulation," "had to put glues with the floors," "had to put all the flooring in, all the tile and the insulation and the paint." He also "had to paint with a lead paint," a situation "he complained about," and he also complained about having to shovel out at the shipyard so-called "Black Beauty" - material used as part of the sandblasting process - because "that gets in your lungs" and, according to Claimant, "He constantly hated" and "was terrified of that" substance. (**Id.** at 7-14)

At his December 15, 2000 deposition, Frederick C. Evarts testified that he began working as a pipecoverer on May 5, 1980 at the Employer's shipyard and remained in that job classification until January 16, 1982, at which time he transferred to work as a carpenter (RX 3). He retired on December 30, 1995 at age 59. Mr. Evarts worked with Decedent on the submarines under construction at the shipyard. According to Mr. Evarts, "We were doing what they called the rubber job. Carpenters installed rubber tiles all over the surface of the boat except for the propeller, every inch. They were about the size of place mats or doormats... First we would have to clean the surface with chemicals, then we would put glue around rubber mats and blow them onto the boat. Then we had air hoses that we had to adjust the pressure on each one of these to make sure they were securely fitted to the submarine surface." According to Mr. Evarts, they used Benzene and Trichloroethane, "and the tiles themselves had a special glue that we had to use. When we cleaned the surface of the boat, we had dust-free cloths that we used. Then when we were finished with those, we just put them down and sometimes at the end of the shift before our shift ended, Mr. Brillowski would go around and clean those rages up and so forth." (CX 16 at 3-6, 16-17)

Mr. Evarts and Decedent sometimes wore gloves and at other times applied the benzene with their "bare hands," apparently because "we didn't realize that it was so dangerous at the time." Decedent also "worked in the tool crib" and his duties involved, **inter alia**, "distribut(ing) all the material that we needed to do the job, everything from the lint-free cloths to the chemicals to the rubber gloves to dust masks to you name it." Decedent also "would go to an oil drum and pump this Benzene into these individual red containers. Then they would be stored in the tool crib. As you needed it to do your job, you would go draw those out and he (Decedent) would hand it to you." Decedent, during that pouring procedure, would usually not be wearing gloves and "definitely" some of the Benzene would

spill as “the funnel would disappear” and it “would spill all over the side of the can. Of course, you’d get it all over (your) hands.” Mr. Evarts worked together with Decedent for about seven and one-half years. (**Id.** at 7-9)

Decedent did not work in the tool crib every day, Mr. Evarts remarking, “You did whatever (job) the boss told you to do. One day might be to the tool crib. One day might be (the) rubber job.” Mr. Evarts worked as “a specialist doing sound damping stuff, whether it was fiberglass or small tiles or fixing some screw-ups, whatever it was.” The so-called “rubber job” took place on every submarine built at the shipyard and members of that “small crew” were given other assignments before the next “ruber job.” Decedent worked every one of those jobs and, according to Mr. Evarts, Decedent “would be down there longer than anybody else too, as I said, to set things up, then to clean up afterwards too; and he always volunteered for overtime.” According to Mr. Evarts, Benzene “would give you a pretty good headache if you used it too much” and there were “special containers on the walls down there where you could wash” the Benzene out of your eyes, “but they were usually empty,” Mr. Evarts recounting an episode “(o)ne night (when) he saw a carpenter who was washing the sides of the boat. He got some of it in his eye. You want to hear some screaming going on.” Mr. Evarts did not know the names of the chemicals with which he worked but he understood it to be Benzene. Mr. Evarts observed Decedent pouring the Benzene into the smaller containers “hundreds” of times. (**Id.** at 9-15)

Mr. Evarts further testified that “(w)e were just supposed to wear cotton gloves so we wouldn’t contaminate the tiles. They didn’t care if we got contaminated. That’s another thing too. The tiles frequently had to be cut because they were all custom fitted to the boat. They had a big saw down there. There’d be like black saw dust all over the place” and he did not “know what was in the tiles either.” (**Id.** at 15)

Mr. Evarts “never saw him smoke” and Decedent “was the sort of person... whom all the bosses liked” because “they would give him a job to do. He would just go and do it. He was never out of work. He seemed to be in good health too.” (**Id.** at 18-19)

Decedent passed away on May 6, 1993 and Dr. Dhimant Patel has certified “acute myelocytic leukemia” (AML) as the immediate cause of death. (CX 3) Funeral expenses exceeded $3,000.00. (CX 2)

On the basis of the totality of this closed record[3], I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**,

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[3]As Claimant was seventy-three (73) years of age as of the time of her January 12, 2000 deposition (CX 14) and as she now lives in Milwaukee, she was excused from attending her hearing on December 21, 2000.

627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer’s burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP**

(Shorette), 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit held that an employer need not rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id**., 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Harford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. The Board has held that credible

complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that her husband experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to her husband's bodily frame, **i.e.**, his acute myelocytic leukemia (CX 3), resulted from his exposure to and inhalation of benzene, toluene and xylene at the Employer's shipyard. The Employer has introduced substantial evidence severing the connection between

such harm and Claimant's maritime employment. Thus, the presumption falls out of the case, does not control the result and I shall now weigh and evaluate the evidence.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should

become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

In the case at bar, Claimant has offered the October 18, 1999 report of Susan M. Daum, M.D., F.A.C.C.P., (CX 1) in support of her claim that her husband's AML constitutes a work-related injury, Dr. Daum is Board-Certified in Internal Medicine and in Preventive Medicine (Occupational Medicine). Dr. Daum, after the usual social and employment history, her review of Decedent's medical records and diagnostic tests and pertinent epidemiological literature/studies relating to benzene-related leukemia, concluded as follows (CX 1 at 3) (Emphasis added):

> **In my opinion, the patient's occupational exposures as a carpenter to benzene, toluene and xylene were significant contributing causes, or the cause of his leukemia. Exposure to benzene, toluene and xylene is associated with leukemia. This exposure is mostly found in groups who are painters, but any trades using these solvents are at risk. Although benzene has been the solvent most often associated with acute leukemia, toluene and xylene have also been associated with leukemias. The literature on benzene is quite extensive.**

Dr. Daum "opinions are expressed to a reasonable degree of medical certainty" and the doctor attached to her report a two-page "bibliography of benzene-related leukemia." (**Id.** at 4-5)

Dr. Daum reiterated her opinions at her March 23, 2001 deposition (CX 19) and her forthright opinions did not waver in the face of intense cross-examination by Attorney Quay. CX 20 are the exhibits used by the doctor at her deposition.

On the other hand, the Employer has offered the February 3, 2001 report of Kenneth A. Kern, F.A.C.S., to support its position that Decedent's AML does not constitute a work-related injury. Initially, I note that the doctor is Board-Certified in Surgery and is a Fellow of the American College of Surgeons and the Society of Surgical Oncology (RX 13).

Dr. Kern, after the usual social and employment history relating to Decedent, his review of Decedent's medical records and pertinent medical/scientific literature, concluded that Decedent died of AML - "a malignant multiplication of a subset of white cells in the bone marrow that take over the body, multiply basically out of control. And you have no function. So that the body's immune system is completely corrupted, becomes ineffective." (RX 12 at 7)

Dr. Kern testified that he "reviewed many materials related to the toxic effects of those chemicals," **i.e.**, benzene, toluene and xylene, that benzene is regarded as a chemical to which certain levels of exposure can indeed lead to leukemia but that "toluene and xylene have never been linked to the development of leukemia and that the epidemiological "studies clearly indicate that there is a threshold effect related to benzene induction of leukemia. Noteworthy is Dr. Kern's candid admission that he had no information about the nature and extent of the exposure to benzene Decedent had at the shipyard. (**Id.** at 8-9) I also note that the doctor's opinions on a lack of causation herein are based on his reading of "a summary of what the literature suggests the level of exposure would have to be to show increased rates of leukemia." (**Id.** at 9)

In summary, Dr. Kern opined that "long-term exposure related to high levels can cause cancer of the blood forming organs. And that's a requirement to get AML, long-term exposure and high levels." (**Id.** at 11) Dr. Kern also testified that AML is also caused as a result of high levels of radiation, as well as by "therapeutic high level radiation," "cigarette smoking" and "truck driving because of the agents in gasoline," and Dr. Kern was aware that Decedent had also worked as an over-the-road truck driver. (**Id.** at 14-15)

Dr. Kern further opined that Decedent's shipyard exposure to benzene was not of sufficient dosage or length of time to have caused his AML. (**Id.** at 17-25)

When Dr. Kern was later told by the Employer that what Decedent used was trichloroethane and not benzene, he "looked it up in a Chemical Hazards In the Workplace Dictionary of Chemicals, Fourth Edition, and while he learned that "the genotoxic data is largely negative," he did state that "its basic toxicity relates to respiratory inhalation at high levels which causes pulmonary or lung toxicity and heart arrhythmias. (**Id.** at 25-28)

In response to intense cross-examination, Dr. Kern candidly admitted that his opinion on the lack of causation "may or may not change" if there should be additional and contradictory information about the nature and extent of Decedent's employment

at the shipyard and his exposures to and inhalation of various chemicals. (**Id.** at 30) Dr. Kern again conceded that several government agencies have determined that benzene is a carcinogen, that it is a potential injurious stimuli and that exposure to benzene can induce AML, the type of cancer from which Decedent suffered and was the cause of his death. (**Id.** at 30-31)

The Employer has also offered the testimony of Paul Bureau (RX 16) and George Clohecy (RX 17) in an attempt to defeat this claim. Paul J. Bureau, who is currently employed at the shipyard as Chief of Industrial Hygiene and who worked at the shipyard from 1979 to 1984 and again from 1990, testified that he never met the Decedent, that there is a material safety data sheet (MSDS) for all hazardous chemicals used at the shipyard, that the MSDSs are distributed "to users of hazardous materials such as employers," that "all employees can access it should they have a need to" and that OSHA requires that all employers maintain the MSDSs. (RX 16 at 3-7)

Mr. Bureau reviewed the MSDSs for the chemicals used at the shipyard (**i.e.**, CX 7 - CX 12), as well as his own list of all of the hazardous materials utilized by carpenters in Department 252, and he testified that he was not aware of any causal relationship between trichlor and AML. (**Id.** at 7-28)

Mr. Bureau admitted that he is not a medical doctor, that he has approximately 14,000 MSDSs in his office, that some of those chemicals no longer are in use, that Decedent "may have been exposed to some of those, yes," that CX 13 contains the names of "maybe three or four hundred" chemicals used in Department 252 by carpenters and that that "listing would be a complete listing of all the products that all the different types of carpenters would be potentially exposed to." Mr. Bureau also admitted that carpenters who were working at the shipyard would occasionally be working next to painters who were also working with additional chemicals. Moreover, carpenters might also be working in close proximity to those employees using various chemicals in nondestructive testing. Mr. Bureau also admitted that benzene is "a causative agent for development of leukemia" and that benzene might be found as an ingredient in other products such as coal naptha and xylene. He also admitted that some of these organic solvents are used to clean off oils, grease, etc., from surfaces that have to be painted. (**Id.** at 24-40)

George W. Clohecy, who has worked at the shipyard since 1974 and currently is carpenter foreman (RX 17), testified that he did "remember (Decedent) vaguely" as Decedent "worked for (him) for a short period of time, that Decedent's primary duties related to the special hull treatment process - "a special

treatment that we put on the outer hull of the submarines" - that he himself has done that work as he worked for three (3) years as a carpenter. Mr. Clohecy disputed the testimony of Mr. Evarts that carpenters used benzene to do that task because trichlor was the chemical used as a cleaner and degreaser. In fact, he denied that there were "barrels of benzene" available for use at the shipyard by the carpenters. (RX 17 at 3-10)

Mr. Clohecy did admit that a carpenter such as Decedent would be working in close proximity to other workers using various hazardous chemicals to perform their assigned tasks, such as painters, pipe laggers, and that he did not have a full understanding of all of the various chemicals (out of a total of 10,000) to which Decedent may have been exposed. In fact, Mr. Clohecy was unable to testify as to the chemical composition of the glue used by carpenters, **i.e.**, the 1102 adhesive. (RX 19; RX 17 at 10-15)

The material safety data sheets for various chemicals, including Benzene Alcohol (CX 9), are in evidence as CX 7 - CX 13. Additional data relating to the chemicals used at the Employer's shipyard is in evidence as RX 14 and RX 19 - RX 21.

Accordingly, in view of the foregoing, this closed record conclusively establishes, and I so find and conclude, that Decedent's AML constitutes a work-related injury as Decedent's exposure to and inhalation of benzene, toluene and xylene contributed, in part, to the development of the AML, that the Employer had timely notice of such injury, that the Employer timely controverted Claimant's entitlement to benefits and that Claimant timely filed for benefits once a dispute arose between the parties. In so concluding, I have given greater weight to the forthright, probative and persuasive evidence offered by the Claimant.

I particularly find more probative and persuasive the sworn testimony of Henry Brayman (CX 25) that benzene was, in fact, used by carpenters to perform that specific task on the hulls of the submarine. That more contemporaneous testimony contradicts the testimony of Mr. Bureau and Mr. Clohecy that benzene was not used by carpenters at the shipyard to perform the task in question. That testimony was accepted by my distinguished and now retired colleague, District Chief Judge Robert M. Glennon (CX 26), and I also accept such testimony. I have also rejected Dr. Kern's opinion as based upon an incomplete history report as to the nature and extent of Decedent's work at the shipyard.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The 1984 Amendments to the Longshore Act apply in a new set of rules in occupational disease cases where the time of injury (**i.e.**, becomes manifest) occurs after claimant has retired. **See Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985); 33 U.S.C. §§902(10), 908(C)(23), 910(d)(2). In such cases, disability is defined under Section 2(10) not in terms of loss of earning capacity, but rather in terms of the degree of physical impairment as determined under the guidelines promulgated by the American Medical Association. An employee cannot receive total disability benefits under these provisions, but can only receive a permanent partial disability award based upon the degree of physical impairment. **See** 33 U.S.C. §908(c)(23); 20 C.F.R. §702.601(b). The Board has held that, in appropriate circumstances, Section 8(c)(23) allows for a permanent partial impairment award based on a one hundred (100) percent physical impairment. **Donnell v. Bath Iron Works Corporation**, 22 BRBS 136 (1989). Further, where the injury occurs more than one year after retirement, the average weekly wage is based on the

National Average Weekly Wage as of the date of awareness rather than any actual wages received by the employee. **See** 33 U.S.C. §910(c)(2)(B); **Taddeo v. Bethlehem Steel Corp.**, 22 BRBS 52 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 46 (1989). Thus, it is apparent that Congress, by the 1984 Amendments, intended to expand the category of claimants entitled to receive compensation to include voluntary retirees.

However, in the case at bar, Decedent may be an involuntary retiree if he left the workforce because of work-related pulmonary problems. Thus, an employee who involuntarily withdraws from the workforce due to an occupational disability may be entitled to total disability benefits although the awareness of the relationship between disability and employment did not become manifest until after the involuntary retirement. In such cases, the average weekly wage is computed under 33 U.S.C. §910(C) to reflect earnings prior to the onset of disability rather than earnings at the later time of awareness. **MacDonald v. Bethlehem Steel Corp.**, 18 BRBS 181, 183 and 184 (1986). **Compare LaFaille v. General Dynamics Corp.**, 18 BRBS 882 (1986), **rev'd in relevant part sub nom. LaFaille v. Benefits Review Board**, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989).

Thus, where disability commences on the date of involuntary withdrawal from the workforce, claimant's average weekly wage should reflect wages prior to the date of such withdrawal under Section 10(c), rather than the National Average Weekly Wage under Section 10(d)(2)(B).

However, if the employee retires due to a non-occupational disability prior to manifestation, then he is a voluntary retiree and is subject to the post-retirement provisions. In **Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985), the Benefits Review Board applied the post-retirement provisions because the employee retired due to disabling non-work-related heart disease prior to the manifestation of work-related asbestosis.

Decedent is a voluntary retiree under the Act as he stopped working on May 23, 1988 to undergo heart surgery, did not return to work, formally retired on July 31, 1989 by a voluntary and “normal retirement” (RX 5), as the AML was not diagnosed until on or about April 29, 1993 and as Claimant did not learn about the causal relationship of the AML to Decedent’s maritime employment until on or about October 18, 1999. (CX 1)

Accordingly, any benefits awarded herein shall be based upon the National Average Weekly Wage as of the date of injury/manifestation, **i.e.**, $360.57.

Death Benefits and Funeral Expenses Under Section 9

Pursuant to the 1984 Amendments to the Act, Section 9 provides Death Benefits to certain survivors and dependents if a work-related injury causes an employee's death. This provision applies with respect to any death occurring after the enactment date of the Amendments, September 28, 1984. 98 Stat. 1655. The provision that Death Benefits are payable only for deaths due to employment injuries is the same as in effect prior to the 1972 Amendments. The carrier at risk at the time of decedent's injury, not at the time of death, is responsible for payment of Death Benefits. **Spence v. Terminal Shipping Co.**, 7 BRBS 128 (1977), **aff'd sub nom. Pennsylvania National Mutual Casualty Insurance Co. v. Spence**, 591 F.2d 985, 9 BRBS 714 (4th Cir. 1979), **cert. denied**, 444 U.S. 963 (1975); **Marshall v. Looney's Sheet Metal Shop**, 10 BRBS 728 (1978), **aff'd sub nom. Travelers Insurance Co. v. Marshall**, 634 F.2d 843, 12 BRBS 922 (5th Cir. 1981).

A separate Section 9 claim must be filed in order to receive benefits under Section 9. **Almeida v. General Dynamics Corp.**, 12 BRBS 901 (1980). This Section 9 claim must comply with Section 13. **See Wilson v. Vecco Concrete Construction Co.**, 16 BRBS 22 (1983); **Stark v. Bethlehem Steel Corp.**, 6 BRBS 600 (1977). Section 9(a) provides for reasonable funeral expenses not exceeding $3,000. 33 U.S.C.A. §909(a) (West 1986). Prior to the 1984 Amendments, this amount was $1,000. This subsection contemplates that payment is to be made to the person or business providing funeral services or as reimbursement for payment for such services, and payment is limited to the actual expenses incurred up to $3,000. Claimant is entitled to appropriate interest on funeral benefits untimely paid. **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 84 (1989).

Section 9(b) which provides the formula for computing Death Benefits for surviving spouses and children of Decedents must be read in conjunction with Section 9(e) which provides minimum benefits. **Dunn v. Equitable Equipment Co.**, 8 BRBS 18 (1978); **Lombardo v. Moore-McCormack Lines, Inc.**, 6 BRBS 361 (1977); **Gray v. Ferrary Marine Repairs**, 5 BRBS 532 (1977).

Section 9(e), as amended in 1984, provides a maximum and minimum death benefit level. Prior to the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, the average weekly wage of Decedent could not be greater than $105 nor less than $27, but total weekly compensation could not exceed Decedent's weekly wages. Under the 1972 Amendments, Section 9(e) provided that in computing Death Benefits,

Decedent's average weekly wage shall not be less than the National Average Weekly Wage under Section 6(b), but that the weekly death benefits shall not exceed decedent's actual average weekly wage. **See Dennis v. Detroit Harbor Terminals**, 18 BRBS 250 (1986), **aff'd sub nom. Director, OWCP v. Detroit Harbor Terminals, Inc.**, 850 F.2d 283 21 BRBS 85 (CRT) (6th Cir. 1988); **Dunn, supra**; **Lombardo, supra**; **Gray, supra**.

In **Director, OWCP v. Rasmussen**, 440 U.S. 29, 9 BRBS 954 (1979), **aff'g** 567 F.2d 1385, 7 BRBS 403 (9th Cir. 1978), **aff'g sub nom. Rasmussen v. GEO Control, Inc.**, 1 BRBS 378 (1975), the Supreme Court held that the maximum benefit level of Section 6(b)(1) did not apply to Death Benefits, as the deletion of a maximum level in the 1972 Amendment was not inadvertent. The Court affirmed an award of $532 per week, two-thirds of the employee's $798 average weekly wage.

However, the 1984 amendments have reinstated that maximum limitation and Section 9(e) currently provides that average weekly wage shall not be less than the National Average Weekly Wage, but benefits may not exceed the lesser of the average weekly wage of Decedent or the benefits under Section 6(b)(1).

In view of these well-settled principles of law, I find and conclude that Claimant, as the surviving Widow of Decedent, is entitled to an award of Death Benefits, commencing on May 6, 1993, the date of her husband's death, based upon the National Average Weekly wage as of that date, or $360.57, pursuant to Section 9, as I find and conclude that Decedent's death resulted from his work-related AML. The Death Certificate certifies as the immediate cause of death, AML (CX 3), according to Dr. Patel. Thus, I find and conclude that Decedent's death resulted from and was related to his work-related injury.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska**

Shipbuilding, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

The Benefits Review Board has held that the employer must pay appropriate interest on untimely paid funeral benefits as funeral expenses are "compensation" under the Act. **Adams v. Newport News Shipbuilding**, 22 BRBS 78, 84 (1989).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review

Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant, after the date of her awareness, advised the Employer of her husband’s work-related injury in a timely fashion and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as

a futile act and in the interests of justice as the Employer refused to accept the claim. As a claim for medical benefits is never time-barred, the Employer is responsible for the reasonable and necessary medical care and treatment in the diagnosis, evaluation and palliative care for Decedent's AML, subject to the provisions of Section 7 of the Act.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted Claimant's entitlement to benefits. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **Director, OWCP v. Luccitelli**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992), **rev'g Luccitelli v. General Dynamics Corp.**, 25 BRBS 30 (1991); **Director, OWCP v. General Dynamics Corp.**, 982 F.2d 790 (2d Cir. 1992); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d

562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

An x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. **Topping v. Newport News Shipbuilding**, 16 BRBS 40 (1983); **Musgrove v. William E. Campbell Co.**, 14 BRBS 762 (1982).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

Section 8(f) relief is not available to the employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

In **Huneycutt v. Newport News Shipbuilding & Dry Dock Co.**, 17 BRBS 142 (1985), the Board held that where permanent partial disability is followed by permanent total disability and Section 8(f) is applicable to both periods of disability, employer is liable for only one period of 104 weeks. In **Huneycutt**, the claimant was permanently partially disabled due to asbestosis and then became permanently totally disabled due to the same asbestosis condition, which had been further aggravated and had worsened. Thus, in **Davenport v. Apex Decorating Co.**, 18 BRBS 194 (1986), the Board applied **Huneycutt** to a case involving permanent partial disability for a hip problem arising out of a 1971 injury and a subsequent permanent total disability for the same 1971 injury. **See also Hickman v. Universal Maritime Service Corp.**, 22 BRBS 212 (1989); **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78 (1989); **Henry v.**

George Hyman Construction Company, 21 BRBS 329 (1988); **Bingham v. General Dynamics Corp.**, 20 BRBS 198 (1988); **Sawyer v. Newport News Shipbuilding and Dry Dock Co.**, 15 BRBS 270 (1982); **Graziano v. General Dynamics Corp.**, 14 BRBS 950 (1982) (where the Board held that where a total permanent disability is found to be compensable under Section 8(a), with the employer's liability limited by Section 8(f) to 104 weeks of compensation, the employer will not be liable for an additional 104 weeks of death benefits pursuant to Section 9 where the death is related to the injury compensated under Section 8 as both claims arose from the same injury which, in combination with a pre-existing disability resulted in total disability and death); **Cabe v. Newport News Shipbuilding and Dry Dock Co.**, 13 BRBS 1029 (1981); **Adams**, **supra**.

However, the Board did not apply **Huneycutt** in **Cooper v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 284, 286 (1986), where claimant's permanent partial disability award was for asbestosis and his subsequent permanent total disability award was precipitated by a totally new injury, a back injury, which was unrelated to the occupational disease. While it is consistent with the Act to assess employer for only one 104 week period of liability for all disabilities arising out of the same injury or occupational disease, employer's liability should not be so limited when the subsequent total disability is caused by a new distinct traumatic injury. In such a case, a new claim for a new injury must be filed and new periods should be assessed under the specific language of Section 8(f). **Cooper**, **supra**, at 286.

However, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, **ipso facto**, establish a pre-existing disability for purposes of Section 8(f). **American Ship-building v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. **Sacchetti v. General Dynamics Corp.**, 14 BRBS 29, 35 (1981); **aff'd**, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, **viz**, a defect in the

human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), **aff'g**, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee. **Sacchetti**, **supra**, at 681 F.2d 37.

As Decedent was a voluntary retiree and as benefits are being awarded under Section 8(c)(23) for Decedent's AML (CX 3), only Decedent's prior pulmonary problems can qualify as a pre-existing permanent partial disability, which, together with subsequent exposure to the injurious stimuli, would thereby entitle the Employer to Section 8(f) relief. In this regard, **see Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 85 (1989).

In **Adams**, the Benefits Review Board held at page 85:

"Regarding Section 8(f) relief and the Section 8(c)(23) claim, we hold, as a matter of law, that Decedent's pre-existing hearing loss, lower back difficulties, anemia and arthritis are not pre-existing permanent partial disabilities which can entitle Employer to Section 8(f) relief because they cannot contribute to Claimant's disability under Section 8(c)(23). A Section 8(c)(23) award provides compensation for permanent partial disability due to occupational disease that becomes manifest after voluntary retirement. **See**, **e.g.**, **MacLeod v. Bethlehem Steel Corp.**, 20 BRBS 234, 237 (1988); **see also** 33 U.S.C. §§908(c)(23), 910(d)(2). Compensation is awarded based solely on the degree of permanent impairment arising from the occupational disease. **See** 33 U.S.C. §908(c)(23). Section 8(f) relief is only available where claimant's disability is not due to his second injury alone. In a Section 8(c)(23) case, a pre-existing hearing loss, or back, arthritic or anemic conditions have no role in the award and cannot contribute to a greater degree of disability, since only the impairment due to occupational lung disease is compensated. In the instant case, therefore, only Decedent's pre-existing COPD could have combined with Decedent's mesothelioma to cause a materially and substantially greater degree of occupational disease-related disability. Accordingly, Decedent's other pre-existing disabilities cannot serve as a basis for granting Section 8(f) relief on the Section 8(c)(23) claim. Similarly, with regard to Section 8(f) relief and the Section 9 Death Benefits claim, only Decedent's COPD could, as a matter of law, be a pre-existing disability contributing to Decedent's death in this case. The

evidence of record establishes a contribution from the COPD to Decedent's death, in addition to respiratory failure from mesothelioma. **See generally Dugas (v. Durwood Dunn, Inc.)**, **supra**, 21 BRBS at 279."

In **Adams**, the Board noted, "there is evidence that prior to contracting mesothelioma, Decedent suffered from chronic obstructive pulmonary disease (COPD), hearing loss, lower back difficulties, anemia and arthritis. The Director argues that Employer failed to establish any elements for a Section 8(f) award based on Claimant's pre-existing chronic obstructive pulmonary disease, back condition, arthritis and hearing loss."

As noted above, Decedent passed away solely because of his AML. (CX 3) In view of the foregoing, the Employer is not entitled to Section 8(f) relief on the basis of the Board's holding in **Adams**, **supra**, and for the following reasons.

Section 8(f) relief is not available to the Employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom.**, **Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director, OWCP**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

Moreover, Employer's liability is not limited pursuant to Section 8(f) where Claimant's disability did not result from the combination of coalescence of a prior injury with a present one. **Duncanson-Harrelson Company v. Director, OWCP**, 644 F.2d 827 (9th Cir. 1981). Moreover, the Employer has the burden of proving that three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982).

Moreover, the Benefits Review Board has held, as a matter of law, that a decedent's pre-existing hearing loss, lower back difficulties, anemia and arthritis are not pre-existing permanent partial disabilities which can entitle employer to Section 8(f) relief because they **cannot contribute** to decedent's disability under Section 8(c)(23). **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 85 (1989). In **Adams**, the Board held that Section 8(c)(23) compensates "only the impairment due to occupational lung disease" and "only decedent's pre-existing COPD (chronic obstructive pulmonary disease) could have combined with decedent's mesothelioma to cause a materially and substantially greater disease of occupational disease-related disability. Accordingly,

decedent's other pre-existing disabilities cannot serve as a basis for granting Section 8(f) relief on the Section 8(c)(23) claim. Similarly, with regard to a Section 9 Death Benefits claim, only decedent's COPD could, as a matter of law, be a pre-existing disability contributing to decedent's death in this case." **Adams**, **supra**, at 85.

In the case **sub judice**, the Employer has not demonstrated the existence of such pre-existing permanent partial disability and, **a fortiori**, Section 8(f) relief is not available.

Responsible Employer

The Employer as a self-insurer is the party responsible for payment of benefits under the rule stated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo**, 350 U.S. 913 (1955). Under the last employer rule of **Cardillo**, the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. **Cardillo**, 225 F.2d at 145. **See Cordero v. Triple A. Machine Shop**, 580 F.2d 1331 (9th Cir. 1978), **cert. denied**, 440 U.S. 911 (1979); **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977). Claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli. **Tisdale v. Owens Corning Fiber Glass Co.**, 13 BRBS 167 (1981), **aff'd mem. sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor**, 698 F.2d 1233 (9th Cir. 1982), **cert. denied**, 462 U.S. 1106, 103 S.Ct. 2454 (1983); **Whitlock v. Lockheed Shipbuilding & Construction Co.**, 12 BRBS 91 (1980). For purposes of determining who is the responsible employer or carrier, the awareness component of the **Cardillo** test is identical to the awareness requirement of Section 12. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205 (1985).

The Benefits Review Board has held that minimal exposure to some asbestos, even without distinct aggravation, is sufficient to trigger application of the **Cardillo** rule. **Grace v. Bath Iron Works Corp.**, 21 BRBS 244 (1988); **Lustig v. Todd Shipyards Corp.**, 20 BRBS 207 (1988); **Proffitt v. E.J. Bartells Co.**, 10 BRBS 435 (1979) (two days' exposure to the injurious stimuli satisfies **Cardillo**). **Compare Todd Pacific Shipyards Corporation v. Director, OWCP**, 914 F.2d 1317 (9th Cir. 1990), **rev'g Picinich v. Lockheed Shipbuilding**, 22 BRBS 289 (1989).

That Decedent may have been exposed to certain chemicals and injurious pulmonary respiratory stimuli while working as a truck driver is no defense herein as the Employer was the last maritime employer to expose Decedent to benzene and the other chemicals that contributed to his AML.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney filed a fee application on August 6, 2001 (CX 28), concerning services rendered and costs incurred in representing Claimant between January 11, 2000 and July 23, 2001. Attorney Stephen C. Embry seeks a fee of $13,263.47 (including expenses) based on 53.50 hours of attorney time at $196.84 and $218.59 per hour and 3.00 hours of paralegal time at $64.00 and $64.73 per hour.

The Employer has objected to the requested attorney's fee as excessive in view of the benefits obtained and the hourly rates charged by the law firm of Embry and Neusner. (RX 25)

In accordance with established practice, I will consider only those services rendered and costs incurred after the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

The Employer objected to the hourly rate and proposed an hourly rate of $200.00 for Attorney Embry and other members of his firm. Initially, I note that Attorney Embry has itemized 53.0 hours of attorney services and that 44.75 hours are requested at an average hourly rate of $196.84, a most reasonable rate for a law practice in Southeastern Connecticut under the Act. The current hourly rate approved by this Administrative Law Judge is $225.00 per hour and this has been so since the Fall of 2000. Therefore, the hourly rate suggested by the Employer is certainly not realistic at this time, especially in contingent litigation where the attorney's fee is dependent upon successful prosecution. Such a fee if adopted in these claims, would quickly diminish the quality of legal representation.

As I have said before, Attorney Embry is one of the three (3) most competent attorneys to appear before this Administrative Law Judge in my twenty-three years on the bench. He is an effective advocate for his clients, is most professional and is always organized when he appears before me.

Furthermore, this case was most vigorously defended by the Employer and resulted in a plethora of exhibits after the December 21, 2000 hearing before me. This was an extremely complex case and was successfully prosecuted with a most reasonable number of hours.

Moreover, in view of the novel issue and its complexity, Attorney Embry is awarded the additional amount of $1,736.53 for a total fee award of $15,000.00. In this regard, **see White v. Old Dominion Marine Railway**, 4 BRBS 279 (1976).

In light of the nature and extent of the most excellent legal services rendered to Claimant by her attorney, the amount of compensation obtained for Claimant and the Employer's comments on the requested fee, I find a legal fee of $15,000 (including expenses of $2,348.22) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed and verified by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay Decedent’s widow, Sultana M. Brillowski (“Claimant”), Death Benefits from May 3, 1993, based upon the National Average Weekly Wage of $360.57, in accordance with Section 9 of the Act, and such benefits shall continue for as long as she is eligible therefor.

2. The Employer shall reimburse or pay Claimant reasonable funeral expenses of $3,000.00 pursuant to Section 9(a) of the Act.

3. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director. Interest shall also be paid on the funeral benefits untimely paid by the Employer.

4. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Decedent's work-related injury referenced herein may have required, commencing on April 29, 1993 and ending on May 6, 1993, subject to the provisions of Section 7 of the Act.

5. The Employer shall pay to Claimant's attorney, Stephen C. Embry, the sum of $15,000.00 (including expenses) as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between January 11, 2000 and July 23, 2001.

A
DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts
DWD:jl